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## Supreme Court of the United States

October Term, 1954

No. 23

ROBERT A. McALLISTER,

*Libellant-Appellant,*

*against*

UNITED STATES OF AMERICA,

*Respondent-Appellee.*

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### LIBELLANT-APPELLANT'S REPLY BRIEF

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JACOB RASSNER,

*Attorney for Libellant-Appellant.*

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Respondent by its brief, chooses to disregard the question before this Honorable Court and attempts to justify the decision of the Court below on a factual basis.

Respondent takes issue with the following pertinent finding by Judge Robert A. Inch:

"In my judgment libellant established by a preponderance of credible evidence that respondent was guilty of negligence in permitting conditions to exist on shipboard which were conducive to the transmission of polio, and that libellant was unduly exposed to infection from these conditions, and it may reasonably be inferred from the evidence that libellant contracted polio on shipboard due to the negligence of respondent rather than having contracted it ashore" (fol. 1285).

The Court below made an estimate of the period of incubation of poliomyelitis as ranging as high as 35 days (p. 448). This is in total disregard of the period fixed by Dr. Samuel Frant, and accepted by the Trial Court, that the incubation period is approximately two weeks

(fol. 374) and that the incubation period may range "From seven to fourteen days. A maximum of two and a half weeks." Dr. Frant also stated that he had no personal knowledge of any case where the illness manifested itself later than fourteen days after the date of the exposure.

"Q. Do you know of any periods greater than fourteen days, where a person has contracted polio from exposure to a source? A. I don't know of any. Otherwise we would have pulled the incubation period over to a longer duration. In other words, if there were cases where we could be sure that polio was contracted within thirty-five days, then we would say that the incubation period is from seven to thirty-five days" (fols. 374, 375).

Respondent argues that the illness was contracted before November 11, 1945, the original date of exposure. Article "Ninth" of the original complaint against the General Agent, Cosmopolitan Shipping Company, Inc., sets forth the date of illness as November 24, 1945 (fol. 512).

The ship's illness report is as follows:

"Q. And on this, in Item No. 6, it states: 'Illness contracted: (a) Date 11/24 45; (c) Place—at Sea (aboard)' " (fol. 508).

which was the first illness report made by McAllister (fol. 510).

Proof of causation was established by the following testimony in response to a hypothetical question predicated on the master's deposition (fols. 287 297).

"Now, under those circumstances, Doctor, would such procedure, that is, taking these men aboard the ship when there was knowledge of polio ashore, be a competent, producing cause of spreading the contagion of polio?

\* \* \*

Q. Yes or no? A. Was the bringing of these men on board the ship a competent, producing cause of spreading--

Of spreading polio. A. Yes.

Q. And in your opinion is that how the polio was spread to Mr. McAllister? A. Yes" (fol. 297).

The citations on page 37 of respondent's brief, treat with inconsistent inferences when equally supported by the evidence. There was no such uncertainty in the case at bar.

The evidence, as given by Dr. Frant, established the fact that the master's negligent introduction of the disease aboard the vessel was the proximate cause of McAllister's illness.

All the other authorities cited in respondent's brief are not persuasive, as they treat with decisions not supported by the evidence or those which are "clearly erroneous".

The sufficiency of the findings of the Trial Court was not raised before, or passed upon by the Court below, hence, respondent's Point III is not properly before this Honorable Court.

Respondent takes the position that the absence of a constitutional provision as to admiralty in the Seventh Amendment of the Constitution of the United States is proof of Congressional intent to have the benefits of remedial legislation affected by the choice of forum.

There is no authority for such contention and the same does not merit discussion as being in obvious conflict with the holding of this Court in *Pope & Talbot v. Hawn*, 74 S. Ct. 202.

Respectfully submitted,

JACOB RASSNER,  
*Attorney for Libellant-Appellant.*